Supreme Court, U.S.
FILED
DEC 10 2003
OFFICE OF THE CLERK

No. 02-10038

In The
Supreme Court of the United States

ROBERT JAMES TENNARD,

Petitioner,

v.

DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

RICHARD H. BURR
BURR & WELCH, P.C.
412 Main Street, Ste. 1100
Houston, Texas 77002
(713) 628-3391
(713) 893-2500 fax
Counsel of Record for Petitioner

ROBERT C. OWEN
OWEN & ROUNTREE, L.L.P.
P.O. Box 40428
Austin, Texas 78704
(512) 232-9391
(512) 804-2685 fax

JORDAN M. STEIKER
727 E. Dean Keeton
Austin, Texas 78705
(512) 232-1346
(512) 232-2399 fax

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

QUESTIONS PRESENTED

1. Is the Fifth Circuit's rule requiring a "nexus" to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), inconsistent with the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002)?

2. Did the Fifth Circuit err in resolving the plainly substantial question of the effect of *Atkins* on the Fifth Circuit nexus rule by denying a COA, rather than granting a COA and giving the substantive issue the merits consideration it deserves?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	1
Statement of the Case	1
A. Course of proceedings	1
B. Facts material to the issues presented	2
Summary of the Argument	8
Argument	11
I. THE FIFTH CIRCUIT HAS MISUNDERSTOOD THE RATIONALE OF *PENRY I* AND ERECTED A BODY OF DOCTRINE AT ODDS WITH IT	11
II. MR. TENNARD ESTABLISHED A VIOLATION OF *PENRY I* NO DIFFERENT THAN PENRY'S OWN, BUT THE FIFTH CIRCUIT FAILED TO CONDUCT AN APPROPRIATE *PENRY I* ANALYSIS	12
A. Mr. Tennard's evidence could not be given effect under the special issues	12
B. The Fifth Circuit failed to conduct a proper *Penry I* analysis of the record	20
III. THE FIFTH CIRCUIT'S "UNIQUELY SEVERE CONDITION" RULE CANNOT JUSTIFY DENYING MR. TENNARD RELIEF	24
A. Evidence of Mr. Tennard's impaired intellectual functioning must be considered in mitigation of a possible death sentence	24

TABLE OF CONTENTS – Continued

Page

B. The Fifth Circuit's "uniquely severe condition" rule is inconsistent with this Court's individualization decisions dating back to *Woodson*, finds no support in *Penry* itself, and cannot be reconciled with the Court's post-*Penry* cases 27

1. The Nature of the Fifth Circuit "uniquely severe condition" rule..... 27

2. The "uniquely severe condition" rule cannot be squared with this Court's leading decisions defining the individualization requirement..... 28

3. *Penry I* cannot be read to establish a "uniquely severe condition" rule..... 30

4. This Court's decisions following *Penry I* leave no room for the Fifth Circuit's "uniquely severe condition" rule..... 33

IV. THE FIFTH CIRCUIT'S "NEXUS" RULE CANNOT JUSTIFY WITHHOLDING RELIEF FROM MR. TENNARD..... 35

A. The Fifth Circuit's "nexus" rule 35

B. The Fifth Circuit's "nexus" rule represents an unjustified departure from this Court's individualization and proportionality decisions..... 37

V. THE FIFTH CIRCUIT ERRED IN DENYING MR. TENNARD A CERTIFICATE OF APPEALABILITY (COA), AND THIS COURT SHOULD DECIDE THE MERITS OF HIS *PENRY I* CLAIM..... 48

CONCLUSION..... 50

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Collins, 21 F.3d 612 (5th Cir. 1994)....21, 22, 28

Atkins v. Virginia, 536 U.S. 304 (2002).....10, 20, 47, 48

Barnard v. Collins, 958 F.2d 634 (5th Cir. 1992).....29

Bell v. Ohio, 438 U.S. 637 (1978).....25, 29

Blue v. Cockrell, 298 F.3d 318 (5th Cir. 2002).....37

Boyd v. Johnson, 167 F.3d 907 (5th Cir. 1999).....48

Boyde v. California, 494 U.S. 370 (1990).....44

Buchanan v. Angelone, 522 U.S. 269 (1998).....44

California v. Brown, 479 U.S. 538 (1987).....24, 38, 40

California v. Ramos, 463 U.S. 992 (1983).....45

Davis v. Scott, 51 F.3d 457 (5th Cir. 1995).....24, 27, 48

Dowthitt v. Johnson, 230 F.3d 733 (5th Cir. 2000).....44

Duhamel v. Collins, 955 F.2d 962 (5th Cir. 1992).....28

Eddings v. Oklahoma, 455 U.S. 104 (1982).....*passim*

Ex parte Tennard, 960 S.W.2d 57 (Tex. Crim. App. 1997).....2, 3

Franklin v. Lynaugh, 487 U.S. 164 (1988).....17

Furman v. Georgia, 408 U.S. 238 (1972).....33

Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc).....30, 36

Harris v. Johnson, 81 F.3d 535 (5th Cir. 1996).....48

Hitchcock v. Dugger, 481 U.S. 393 (1987).....25, 29

Johnson v. Texas, 509 U.S. 350 (1993).....14, 19

Lackey v. Scott, 28 F.3d 486 (5th Cir. 1994)....21, 22, 27, 30, 48

TABLE OF AUTHORITIES – Continued

Page

Lockett v. Ohio, 438 U.S. 586 (1978).....28, 31, 44

Madden v. Collins, 18 F.3d 304 (5th Cir. 1994).....27, 36

McKoy v. North Carolina, 494 U.S. 433 (1990).....*passim*

Miller-El v. Cockrell, 537 U.S. 322 (2003).....49

Mills v. Maryland, 486 U.S. 367 (1988).....29

Motley v. Collins, 3 F.3d 781 (5th Cir. 1993) (*Motley I*).....12, 36, 37

Motley v. Collins, 18 F.3d 1223 (5th Cir. 1994).....37

Nelson v. Cockrell, 77 Fed. Appx. 209 (5th Cir. 2003) (unpublished).....36

New Jersey v. T.L.O., 469 U.S. 325 (1985).....34, 44

Payne v. Tennessee, 501 U.S. 808 (1991).....41

Penry v. Johnson, 532 U.S. 782 (2001) (*Penry II*).....23, 37

Penry v. Lynaugh, 492 U.S. 302 (1989) (*Penry I*).....*passim*

Robertson v. Cockrell, 325 F.3d 243 (5th Cir. 2003) (en banc).....*passim*

Russell v. Collins, 998 F.2d 1287 (5th Cir. 1993).....12, 36

Skipper v. South Carolina, 476 U.S. 1 (1986).....42, 44

Smith v. Cockrell, 311 F.3d 661 (5th Cir. 2002).....27, 29, 30, 31, 32

South Carolina v. Gathers, 490 U.S. 805 (1989).....41

Tennard v. Cockrell, 284 F.3d 591 (5th Cir. 2002).....*passim*

Tennard v. Cockrell, 317 F.3d 476 (5th Cir. 2003).....1, 2, 20

Tennard v. Cockrell, 537 U.S. 802 (2002).....1, 2, 20

Tennard v. Dretke, 124 S. Ct. 383 (2003).....1, 20

TABLE OF AUTHORITIES – Continued

Page

Tennard v. State, 802 S.W.2d 678 (Tex. Crim. App. 1990).....1, 3

Turner v. Murray, 476 U.S. 28 (1986).....44

Weeks v. Angelone, 528 U.S. 225 (2000).....44

Wiggins v. Smith, ___ U.S. ___, 123 S. Ct. 2527 (2003).....10, 29, 35, 42

Williams v. Taylor, 529 U.S. 362 (2000).....10, 34, 35, 43, 44

Woodson v. North Carolina, 428 U.S. 280 (1976).....25, 38, 45

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII .....*passim*

STATUTES

28 U.S.C. § 1254(1) (2002) 1

28 U.S.C. § 2106 (2002).....49

Tex. Crim. Proc. Ann. art. 37.071 (Vernon 2002).....16, 26

Tex. Pen. Code § 6.03 (2002).....15

Tex. Pen. Code § 7.01 (2002).....16

Tex. Pen. Code § 7.02 (2002).....15, 16

Tex. Pen. Code § 8.01 (2002).....32

Tex. Pen. Code § 19.02 (2002).....15

Tex. Pen. Code § 19.03 (2002).....15

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

Model Penal Code § 210.6 (Proposed Official Draft 1962).....33

Alexander J. Tymchuk, L. Charlie Lakin & Ruth Luckasson (eds.), *The Forgotten Generation: The Status and Challenges of Adults with Mild Cognitive Limitations* (2001).....25

Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 Yale L.J. 835, 856-57 (1992).....23

"Mainstream Science on Intelligence," *Wall Street Journal*, December 13, 1994, A18.....25

OPINIONS BELOW

The Fifth Circuit's opinion is reported as *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003), and attached to the Petition for Certiorari as Appendix 1. It reinstated the Fifth Circuit's opinion in *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002), *vacated by*, 537 U.S. 802 (2002), which is attached to the Petition for Certiorari as Appendix 2.

JURISDICTION

The Fifth Circuit announced its latest decision on January 3, 2003. The petition for certiorari was filed on April 3, 2003, and granted on October 14, 2003. *Tennard v. Dretke*, 124 S.Ct. 383 (2003). The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. The relevant portion of the Eighth Amendment provides: "nor [shall] cruel and unusual punishments [be] inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

A. Course of proceedings

Robert Tennard was convicted of capital murder and sentenced to death in Harris County, Texas, in October 1986. The Texas Court of Criminal Appeals affirmed his conviction and sentence. *Tennard v. State*, 802 S.W.2d 678 (Tex. Crim. App. 1990), *cert. denied*, 501 U.S. 1259 (1991). Thereafter, Mr. Tennard sought habeas corpus relief in the state courts. On December 18, 1997, the Court of Criminal

Appeals denied relief. *Ex parte Tennard*, 960 S.W.2d 57 (Tex. Crim. App. 1997). JA 79.

Mr. Tennard filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas on December 18, 1998. The district court denied the petition on July 25, 2000. JA 121. Mr. Tennard filed a timely notice of appeal and requested a certificate of appealability. On March 1, 2002, a panel of the Court of Appeals for the Fifth Circuit denied a certificate in a 2-1 decision. *Tennard v. Cockrell*, 284 F.3d 591 (5th Cir. 2002), *vacated by*, 537 U.S. 802 (2002). Rehearing was denied on April 4, 2002.

This Court granted Mr. Tennard's ensuing petition for certiorari on October 7, 2002, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002)." *Tennard v. Cockrell*, 537 U.S. 802 (2002). On January 3, 2003, the Fifth Circuit on remand reinstated its previous opinion. *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003).

B. Facts material to the issues presented

The evidence at the guilt phase of Mr. Tennard's capital trial established that he and two other men robbed and murdered Larry Neblett and Chester Smith, who were acquaintances of Tennard. As the Court of Criminal Appeals summarized the facts:

> Paul Anthony Bogany testified that on the evening of August 15, 1985, he went to the Groovey Shack Lounge located in Harris County, Texas. There he met [Tennard] and another man, Daniel Groom. Around 8:00 p.m., the three walked to the house of an alleged friend of [Tennard]. [Tennard], Bogany, and Groom drank liquor and smoked marihuana with the eventual victims, Larry Neblett and Chester Smith, for about half

> an hour. At some point, Neblett left the room, followed by [Tennard]. Smith remained in the front room with Groom and Bogany. Shortly thereafter, as Smith was changing a record, Groom struck Smith several times with a hatchet. After Smith fell to the ground, Groom ran to the bedroom where [Tennard] and Neblett had gone. As Groom opened the door, a bloody Neblett fell through the doorway. [Tennard] was seen in the bedroom clutching a knife in his hand. [Tennard], Groom, and Bogany then took various pieces of property from the home of the victims and left in a car belonging to one of the victims.

Tennard, 802 S.W.2d at 679. In a later opinion in state habeas proceedings, the Court of Criminal Appeals noted the following additional facts pertaining to the offense:

> [Tennard] lived behind the home of the victims, and he knew them. The victims had invited [Tennard] and his two friends into their home approximately fifteen to thirty minutes before they were attacked. [Tennard] stabbed one of the victims fifteen times with a knife while one of [Tennard]'s friends killed the other victim with a hatchet. [Tennard~~] played a dominant role in~~ disposing of the victims' stolen property.

Ex parte Tennard, 960 S.W.2d at 58; JA 80.

In the penalty phase, Mr. Tennard's jury was required to answer only the pre-*Penry*[1] Texas special issues relating to deliberateness and future dangerousness:

> 1. Was the conduct of the defendant, Robert James Tennard, that caused the death of the

[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*).

deceased committed deliberately and with the reasonable expectation that the death of the deceased . . . would result?

2. Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?

JA 69, 70.[2] The court instructed the jury that if it answered both issues in the affirmative, the court would sentence Tennard to death, but that if it answered either issue in the negative, the court would sentence him to life imprisonment. JA 67.

As in virtually all Texas capital cases tried before 1991, the State's penalty-phase evidence was directed at the future dangerousness special issue. The State proved that Mr. Tennard was convicted of rape at age 16 and was in prison from 1979 until released on parole on April 24, 1985. SF 29:55-56.[3] The complainant in the rape case, Valerie Soto, testified that Tennard had been one of three men who sexually assaulted her. SF 29:27-46; JA 5-26. She also testified that, following the assault, Tennard allowed her to go to the bathroom to take a bath based on her assurance that she would not escape:

Q. Now you told them that you wanted to take a bath?

[2] The Texas death penalty statute in effect at the time of Mr. Tennard's trial called for a third special issue concerning provocation by the victim to be answered in cases in which the evidence raised it, but Mr. Tennard's jury was not instructed on that special issue for lack of evidence raising it.

[3] References to the trial transcript, in Texas then called the "Statement of Facts" (hence "SF"), are to the volume number, and then to the page numbers within that volume.

A. Yes, I did.

Q. Did Mr. Tennard say anything?

A. He told me I wasn't going to try to run away, was I.

Q. What did you tell him?

A. I told him, "No, baby. I like you. I wouldn't do that."

Q. Did he seem to buy this statement?

A. Yes, he did.

SF 29:37-38; JA 16. While in the bathroom, Ms. Soto escaped through a window. SF 29:37-38; JA 16 at 38. On cross-examination, defense counsel brought out a prior statement in which Ms. Soto indicated that one of the other men who assaulted her, and not Tennard, was the leader. SF 29:43-44. JA 16-17.

Tennard's only penalty phase witness was William Kinard, his parole officer. SF 29:56; JA 27-39.[4] Kinard identified "records of Tennard's IQ level according to the Texas Department of Corrections' records." SF 29:56; JA 28. According to those records, Tennard has an IQ of 67. SF 29:58; JA 29.[5] Kinard testified that as a matter of

[4] Tennard proffered evidence that his co-defendant, Daniel Groom, was convicted of capital murder but sentenced to life imprisonment in a separate trial. SF 29:64-65; JA 34-36. The trial court ruled that evidence inadmissible. SF 29:68; JA 38. As the Court of Criminal Appeals' summary of the case indicates, Groom was the sole killer of Chester Smith. Groom also participated in the killing of Larry Neblett: Paul Bogany testified that when Mr. Neblett fell through the doorway of the bedroom after apparently having been stabbed by Tennard, Groom struck Neblett on the head with his hatchet. SF 22:404.

[5] The document noting Mr. Tennard's IQ was introduced thereafter on cross-examination as State's Exhibit 186. *See* JA 63.

course the Texas Department of Corrections tests an inmate's IQ. SF 29:58; JA 28.

Both the prosecution and defense discussed Tennard's IQ evidence in closing. The prosecution spoke to the jury first and preemptively downplayed the evidence: "I'm sure the defense is going to ask you to forgive this man for what he's done. Say that he has a low IQ and that you should give him another chance." SF 29:72; JA 41. "If you feel like that's what you need to do, then that's what you need to do." SF 29:72; JA 41. He alluded, though, to the focus of the special issues, urging the jurors to make their decision "based on the facts," and reminding them to "[l]ook at what you promised us you'd look at. . . . " SF 29:72; JA 41.

Defense counsel indeed focused on how Tennard's impaired intellectual functioning, as evidenced by his low IQ and naivete, together with his poor upbringing, called for a life sentence instead of death. He repeatedly urged the jury to take into consideration Tennard's impaired intellectual functioning. SF 29:85, 93-94; JA 51, 57-58. He reminded the jury that the evidence was not in dispute:

> Then I called a witness who testified he's Tennard's parole officer. Uncontroverted evidence that when Robert Tennard was examined, when he got out of the penitentiary, by the officials who determined how to classify him, how to treat him, the same information that was communicated to his parole officer. . . . Information that the prison psychiatrist had . . . is that Tennard has got a 67 IQ.

SF 29:85; JA 51.

Defense counsel then argued that Tennard's behavior bore the mark of a man with a 67 IQ:

> The same guy that told this poor unfortunate woman [the rape victim] that was trying to work that day, 'Well, if I let you in there, will you

> leave?' And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient . . . that is *that low*.

SF 29:85; JA 51 (emphasis added). Referring to his subnormal IQ, defense counsel challenged the jury

> to judge [Tennard] as his peers. That's going to be hard for you to do. None of you grew up where he grew up. Only one of you is black and *none of you are suffering from a 67 IQ*.

SF 29:93; JA 57 (emphasis added). Not having any way in which he could ask the jury to give effect to Tennard's evidence of low IQ as relevant to either special issue, counsel simply urged the jury to take it into account in deciding how to answer the two issues:

> [T]he law allows you to take all the things into consideration that I talked to you about – attitude toward the death penalty, take all these things into consideration, the 67 IQ – in deciding how you answer those questions. You have a right to do that under Texas law.

SF 29:94; JA 57-58.

In its rebuttal closing argument, the prosecution responded forcefully to defense counsel's plea for consideration of Tennard's low intelligence in connection with the special issues. The prosecutor told the jury that the law did *not* allow the mitigating aspects of such evidence to affect its answer to the future dangerousness issue:

> But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, [sic] the reasons why he became a danger are not really relevant. The fact

that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.

SF 29:98; JA 60 (emphasis added).

The jury answered both issues affirmatively, and Tennard was sentenced to death.

SUMMARY OF THE ARGUMENT

For a brief period in modern death penalty practice, defendants were sentenced to death under one anomalous state statute without a determination that they deserved to die. Jurors in Texas were asked only if the defendant's conduct was deliberate and whether the defendant would be a danger in the future. In *Penry v. Lynaugh*, 492 U.S. 302 (1989) [*Penry I*], the Court undertook to end that aberrant practice, reversing the death sentence of a Texas defendant because evidence of his mental retardation and history of childhood abuse had relevance that could not be given meaningful effect within Texas' special issues.

In the years since *Penry I*, virtually none of the defendants sentenced to death under the procedure found unconstitutional in that case have been given new sentencing hearings, despite the fact that many of them presented evidence strikingly similar to Penry's. Instead of following this Court's *Penry I* analysis – which focused squarely on whether jurors could give effect to evidence of a capital defendant's character and record offered in mitigation – the Fifth Circuit has crafted an unprecedented body of law purporting to establish standards for "constitutional relevance." According to this jurisprudence, mitigating evidence is constitutionally irrelevant unless (1) it establishes a "uniquely severe permanent condition" with which the defendant was burdened through no fault of his own, and (2) it is shown to have "caused" the defendant to

commit the crime (the "nexus" requirement). Only evidence that meets these two threshold criteria is analyzed under *Penry I* to determine if the jury could have given it mitigating effect.

This case reveals the divergence of the Fifth Circuit's approach from *Penry I*'s. Evidence of Mr. Tennard's impaired intelligence, reflected both in his 67 IQ score and in his behavior during criminal activity, has long been regarded as mitigating for exactly the same reasons as Penry's evidence of mental retardation. Such evidence, in exactly the same way as Penry's, could not be given adequate effect through Texas' special issues. Indeed, Mr. Tennard's evidence, like Penry's, tended to support an *affirmative* answer to the dangerousness issue and thus to have an *aggravating* rather than a mitigating impact. Nonetheless, when filtered through the Fifth Circuit's elaborate severity and nexus tests, Mr. Tennard's evidence was dismissed as constitutionally irrelevant.

This Court should reject the Fifth Circuit's severity and nexus tests. It should reaffirm that the old Texas special-issue scheme is constitutionally inadequate as applied to defendants whose mitigating evidence could not be given meaningful effect through those issues. It should also reaffirm what is clear in every contemporary death penalty statute (including Texas' post-*Penry I* scheme) – that evidence of reduced culpability need not rise to the level of a full "excuse" from criminal liability before it is deemed constitutionally relevant. Finally, by reversing the decision below, the Court should reaffirm the settled principle that appellate and postconviction courts are not to substitute their assessment of the weight and significance of mitigating evidence for the reasoned moral judgment of jurors relying on their commonsense understanding and experience.

The inappropriateness of the Fifth Circuit's glosses on *Penry I* is apparent from the entire body of pre-*Penry I* law

explaining the Eighth Amendment individualization requirement. It is further confirmed by this Court's recent decisions in *Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), invalidating death sentences because of defense lawyers' failures to investigate and develop mitigating evidence. In neither case did the Court suggest that the prejudice prong of the standard ineffectiveness inquiry required the defendant to establish a "uniquely severe" condition through mitigating evidence or a "nexus" linking that condition to the defendant's crime. And it is still further confirmed by this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). In holding that the death penalty is disproportionate as applied to persons with mental retardation, *Atkins* took the view that evidence of mental retardation, whether or not explicitly connected by some "nexus" to the defendant's crime, *inherently* mitigates a retarded defendant's moral culpability.

In view of this Court's decisions culminating in *Penry I*, *Penry I* itself, and the post-*Penry I* decisions reconfirming the importance of giving effect to mitigating evidence, the Fifth Circuit's ruling denying a certificate of appealability is insupportable. Not only *could* jurists of reason disagree with the district court's ruling rejecting Mr. Tennard's *Penry I* claim; they are bound to disagree with it. Since the merits of the Fifth Circuit's misguided post-*Penry I* rules are before the Court in the companion case to Mr. Tennard's, and since those rules are wrong both in general and as applied to Mr. Tennard, the Court should also reach the merits here and vacate Mr. Tennard's death sentence.

ARGUMENT

I. THE FIFTH CIRCUIT HAS MISUNDERSTOOD THE RATIONALE OF *PENRY I* AND ERECTED A BODY OF DOCTRINE AT ODDS WITH IT.

In a string of opinions, the Fifth Circuit has misconceived the rationale of *Penry I*, and, proceeding step by step from its initial misconception, has constructed an elaborate body of post-*Penry* doctrine that conflicts with and undermines *Penry*. These rules purport to define the scope of "constitutionally relevant mitigating evidence" and, by constricting it, largely moot the core inquiry mandated by *Penry I*: whether the kinds of evidence relating to a Texas capital defendant's character and record that the defendant offered in mitigation could or could not be given mitigating effect via the two or three special issues prescribed by Texas' pre-*Penry I* death-penalty statute. The Fifth Circuit's rules have had the effect of classifying most mitigating evidence – evidence which every other jurisdiction deems constitutionally relevant – as constitutionally *irrelevant*. Because of these rules, the Fifth Circuit has rarely reached the question whether evidence that is proffered in mitigation could have been given mitigating effect through the special issues. To be "constitutionally relevant mitigating evidence" under the Fifth Circuit's rules, the evidence must show (1) that a defendant is handicapped by a "uniquely severe permanent condition" with which the defendant was burdened through no fault of his own, and (2) that this uniquely severe permanent condition caused him to commit the crime – a second limitation that the Fifth Circuit has termed the "nexus" requirement. *See, e.g.*, *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003) (en banc) (describing this analytical framework in detail). In the Fifth Circuit's view, the "nexus" requirement is not "peculiar to the Texas special issues [but] goes to the very core of what qualifies as constitutionally relevant mitigating

evidence." *Motley v. Collins*, 3 F.3d 781, 791 n.10 (5th Cir. 1993) (*Motley I*), *withdrawn and superceded*, 18 F.3d 1223, 1234-1235 (5th Cir. 1994). *See also Russell v. Collins*, 998 F.2d 1287, 1292-1293 (5th Cir. 1993) (whether defendant's mitigating evidence was within jurors' effective reach under the special issues is "not relevant," because absent proof of nexus, "the Eighth Amendment is not implicated in the first place"). Similarly, in Mr. Tennard's case and others, it has held that the "uniquely severe permanent handicap" requirement is also not peculiar to the Texas special issues but is a condition that defines constitutionally relevant mitigating evidence in general. *Tennard v. Cockrell*, 284 F.3d at 595. If, and only if, a defendant's proffered mitigating evidence surmounts these elevated barriers is a defendant constitutionally entitled to some means through which the jury can give effect to that evidence in imposing sentence.

We will show in later sections of this brief that there is no support in the Court's death-penalty jurisprudence for the Fifth Circuit's limitations on constitutionally relevant mitigating evidence. Before embarking on that showing, we examine how *Penry I* was violated in Mr. Tennard's case and how the Fifth Circuit's tests for "constitutionally relevant mitigating evidence" diverted the Circuit Court from recognizing the violation.

II. MR. TENNARD ESTABLISHED A VIOLATION OF *PENRY I* NO DIFFERENT THAN PENRY'S OWN, BUT THE FIFTH CIRCUIT FAILED TO CONDUCT AN APPROPRIATE *PENRY I* ANALYSIS.

A. Mr. Tennard's evidence could not be given effect under the special issues.

The sole evidence presented by the defense in the penalty phase of Mr. Tennard's trial was his 67 IQ score. On cross-examination of the defense witness through whom this evidence was introduced, the prosecution

established that the document reporting Mr. Tennard's IQ was not from a psychiatrist, SF 29:59; JA 30, and that the document did "no[t] indicat[e] . . . who may have given those tests or under what conditions." SF 29:60; JA 30. However, the prosecution introduced no evidence to draw into question the accuracy of the assessment of Mr. Tennard's IQ as 67.

In his closing argument, defense counsel argued that "an intelligence quotient . . . that low," SF 29:85; JA 51 – referring to Tennard's IQ of 67 – affected Tennard's judgments and behavior. To illustrate his point, he cited the simplistic, naive judgment Tennard made in relation to his prior rape victim, believing her assurances that if he let her go to the bathroom she would not attempt to escape because she "like[d] [him]," SF 29:37; JA 16. *See* SF 29:85; JA 51. Counsel then argued that Tennard's impaired judgment was a reason to spare Mr. Tennard from the death penalty. SF 29:93-94; JA 57-58. Counsel did not attempt to explain to the jurors how they could bring this evidence to bear in answering either of the special issues, nor could he plausibly have done so. He simply argued that "[t]he law allows you to take . . . [the evidence] . . . into consideration . . . in deciding how you answer those questions." SF 29:94; JA 57-58.

The prosecutors dealt with this evidence and argument in two ways. Anticipating in their initial penalty-phase closing argument that the defense would urge that Mr. Tennard's low IQ was a basis for "giv[ing] him another chance," the prosecutors argued that the jury should, instead, make its decision "based on the facts" relevant to the two special issues. SF 29:72; JA 41. To emphasize that this was the jury's duty, the prosecutor reminded the jurors that each of them had "promised us you'd look at" only the relevant facts. SF 29:72; JA 41. Second, the prosecutors implied that Mr. Tennard's intellectual impairment was one of "[t]he reasons why he became a

danger . . . ," SF 29:98; JA 60, arguing that the "reasons why he became a danger are not really relevant," because "[t]he fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question." SF 29:98; JA 60.

Like the petitioner in *Penry I*, Tennard "argues that his mitigating evidence of [impaired intellectual functioning] has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." 492 U.S. at 322. Tennard's jury, like Penry's, "was never instructed that it could consider the evidence offered by [Tennard] as mitigating evidence and that it could give mitigating effect to that evidence." *Id.* at 320. Thus, the determinative constitutional question is whether "the jury had a meaningful basis to consider the relevant mitigating [evidence]. . . ." *Johnson v. Texas*, 509 U.S. 350, 369 (1993).

As in *Penry I*, the first special issue – whether Mr. Tennard killed Mr. Neblett "deliberately and with the reasonable expectation that [his] death . . . would result," JA 69 – was not framed by any definition of the key term, "deliberately." The *mens rea* for the crime charged was described in the jury's instructions as follows:

> A person commits murder when he intentionally causes the death of another.
>
> A person commits capital murder if such person commits the murder in the course of committing or attempting to commit the offense of robbery. [The *mens rea* for robbery is then defined.]
>
> . . . .
>
> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective

> or desire to engage in the conduct or cause the result.

Transcript, *Tennard v. State*, No. 431127 (248th Dist. Ct., Harris County, Tex. 1986), at 156-57; Tex. Pen. Code §§ 19.02(b)(1), 19.03 (a)(2), 6.03(a) (2002). In light of these instructions, and in the absence of any instruction explaining the difference between killing "intentionally" and killing "deliberately," it is impossible to be sure how the jury understood the mental state associated with special issue number one.[6] Indeed, "deliberately" and "intentionally" have such similar meanings and connotations in ordinary language that jurors could easily have concluded that their finding of an intentional killing during the guilt-innocence phase mandated an affirmative answer to the first special issue.[7]

---

[6] The Court's observation in *Penry I* is thus accurate both in general and in Mr. Tennard's case in particular: "Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term 'deliberately,' and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it." 492 U.S. at 322.

[7] The evolution of the Texas death-penalty statute makes plain that the "deliberateness" question was not intended to establish a heightened *mens rea* requirement for imposing a death sentence. Rather, the issue was crafted to ensure that defendants convicted under a theory of vicarious liability (called "the law of parties" in Texas) acted with appreciation of the risk of death. Although a capital murder conviction requires an "intentional" killing, persons convicted under the law of parties need not themselves have harbored an intent to kill. *See, e.g.*, Tex. Pen. Code § 7.02(b) (2002) ("If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy."). The post-*Penry I* statute makes the goal of this issue clear, replacing the old deliberateness question with a new question

(Continued on following page)

Even "[a]ssuming," as the Court did in these same circumstances in *Penry I*, "that the jurors in this case understood 'deliberately' to mean something more than that [Tennard] was guilty of 'intentionally' committing murder," the result here continues to be governed by the reasoning in *Penry I* that "those jurors may still have been unable to give effect to [Tennard's] mitigating evidence in answering the first special issue." 492 U.S. at 322. Theoretically, Tennard's impaired intellectual functioning, like Penry's mental retardation, "was relevant to the question whether he was capable of acting 'deliberately,'" *id.*, insofar as the jury might have determined that whatever additional planning and preparation are involved in doing an act deliberately – as distinguished from intentionally – were beyond Tennard's limited intellectual abilities. However, the evidence here was not likely to be seen as permitting such a determination. Despite Tennard's limited functioning, it is probable that the jury accepted the prosecution's theory that he deliberately killed Neblett as part of a plan he and Groom put together to "go [ ]in for something."[8] And the fact that neither defense counsel nor the prosecutor (in anticipation or rebuttal) argued to the jury that Tennard's documented IQ of 67 bore upon the special issue whether he acted "deliberately" confirms that

applicable only to persons convicted of murder for an accomplice's homicidal act. *See* Tex. Crim. Proc. Code Ann. art. 37.071, Sec. 2(b)(2) (Vernon 2002) ("in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, [the jury must determine] whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life be taken").

[8] The state's chief witness, Paul Bogany, testified that Tennard had asked him earlier in the evening "if I wanted to go [ ]in for something," SF 22:391, which he understood to mean to "[g]o make some money, go steal, something like that." SF 22:392.

no one at Tennard's trial imagined it could be relevant to that issue. So, if Tennard's limited intellectual functioning and resulting shortsighted judgment – reflected in his decision to allow the rape victim to go to the bathroom – were to be considered mitigating by his jury, it would have had to have been outside the framework of special issue number one and according to some reasoning that made Tennard "less morally 'culpable than defendants who have no such excuse,' but who act[ ] 'deliberately' as that term is commonly understood." *Penry I*, 492 U.S. at 322-23 (citation omitted).[9] As in *Penry I*:

> In the absence of jury instructions defining 'deliberately' in a way that would clearly direct the jury to consider fully [Tennard's] mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of [Tennard's low intellectual functioning] in answering the first special issue. Without such a special instruction, a juror who believed that [Tennard's low IQ] diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that [Tennard] committed the crime 'deliberately.' Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to [Tennard's] mitigating evidence.

Id. at 323.

[9] Mr. Tennard's impaired intellectual functioning, like Penry's mental retardation, was not merely "relevant to the question whether he was capable of acting 'deliberately,' but it also 'had relevance to [his] moral culpability beyond the scope of the special verdict questio[n].'" *Penry I*, 492 U.S. at 322 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988)).

Likewise, the second special issue – concerning the probability of Tennard's being dangerous in the future – provided no vehicle for the jury to give mitigating effect to his impaired intellectual functioning. To the contrary, the jury could reasonably have viewed his low IQ as *aggravating* with reference to special issue number two. The jurors could have inferred that Tennard's low IQ was a factor contributing to his previous violent crime of rape and to the capital murders of Larry Neblett and Chester Smith. Making shortsighted judgments – that is, decisions that fail to anticipate the consequences of one's actions – is commonly associated with limited intellectual functioning; and it was clear from the testimony of Tennard's rape victim that Tennard's capacity for normal judgment was impaired. Even without a prompt from the prosecutor, Mr. Tennard's jury could therefore have found that his impaired capacity for making judgments was likely to contribute to violent behavior in the future. And the jury was so prompted when the prosecutor implied in closing that Tennard's low IQ was one of "[t]he reasons *why* he became a danger. . . . " SF 29:98; JA 60 (emphasis added).

Like mental retardation, impaired intellectual functioning is a "two-edged sword." *Penry I*, 492 U.S. at 324. "[I]t may diminish [Tennard's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.* Properly instructed, a jury might well view Tennard's impairment as reducing his moral culpability. Properly instructed, such a jury could weigh the mitigating force of this impairment against its aggravating potential under special issue number two. But Mr. Tennard's jury was not properly instructed, and could have viewed his impairment, through the lens of special issue number two, *only* as aggravating. As in *Penry I*, "[t]he second special issue . . . did not provide a vehicle for the jury to give mitigating effect to [Tennard's] evidence of [impaired intellectual

functioning]," *id.*, but rather made the evidence exclusively aggravating or irrelevant.[10]

In sum, Mr. Tennard's trial was infected by the very constitutional error that this Court condemned in *Penry I*. Tennard introduced evidence of impaired intellectual functioning in the penalty phase and focused on that evidence as the central reason for sparing his life. Tennard argued to the jury that this evidence warranted a negative answer to one or another of the special issues, even though the evidence could not logically have supported such an answer or been given mitigating effect through either special issue. The prosecution, for its part,

---

[10] Compare *Johnson v. Texas*, 509 U.S. 350 (1993). In *Johnson*, the Court held that a capital defendant's evidence of youth did not require an additional instruction going beyond the former Texas special issues to ensure a constitutionally adequate sentencing determination. The Court based this holding on a finding that youth had particular relevance to the second special issue, which focused on the defendant's future dangerousness. It noted that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." 509 U.S. at 368. Unlike Penry's jury, Johnson's jury therefore "had a meaningful basis to consider the relevant mitigating qualities" of Johnson's evidence. *Id.* at 369.

Mr. Tennard's evidence of impaired intellectual functioning, like Penry's evidence of mental retardation, stands in stark contrast to Johnson's evidence of chronological immaturity. Low intelligence, whether manifest in borderline, moderate, or severe mental retardation, is a permanent condition. Mr. Tennard's jurors could not reasonably have concluded that the "signature qualities" of his low intelligence were "transient," any more than they could reasonably have supposed that these qualities would render him *less* likely to commit criminal acts in the future. The very reasoning by which the Court concluded that the second special issue provided a meaningful vehicle for consideration of Johnson's evidence of youth explains why that issue did *not* provide a meaningful vehicle for consideration of Tennard's evidence of impaired intellectual functioning.

highlighted the jurors' inability to give mitigating effect to the evidence of Tennard's impaired intellectual functioning by telling them that this evidence did not refute Tennard's commission of a deliberate killing and by noting that the evidence showed only *why* Tennard *was* dangerous. The prosecution pointedly reminded the jurors that each of them had "promised us you'd look at" only the relevant facts – the facts relevant to the special issues – as a means of assuring that no juror would embrace Tennard's lawyer's plea to answer one of the special issues "no" on the basis of the logically irrelevant mitigating potential of Tennard's impaired intellectual functioning. Mr. Tennard is unmistakably entitled to relief from his death sentence under *Penry I* unless such relief is barred by the Fifth Circuit's doctrine of "constitutionally relevant mitigating evidence" – to which we now turn.

B. The Fifth Circuit failed to conduct a proper *Penry I* analysis of the record.

The panel majority below[11] held that Mr. Tennard's evidence of impaired intellectual functioning was not constitutionally relevant mitigating evidence or, if it was,

[11] In the 2002 Term, Mr. Tennard sought certiorari review of the Fifth Circuit's original panel decision, 284 F.3d 591, rejecting his claim under *Penry I*. This Court granted certiorari, vacated the Fifth Circuit's judgment, and remanded for further consideration in light of *Atkins v. Virginia*. *Tennard v. Cockrell*, 537 U.S. 802 (2002). On remand, the Fifth Circuit did not reexamine its decision of the *Penry I* issue, treating the remand as limited to determining whether Tennard had raised an *Atkins* claim. *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003). After concluding that he had not done so, the court reinstated its previous decision. Thus, the present grant of certiorari again on Mr. Tennard's *Penry I* claim, *Tennard v. Dretke*, 124 S.Ct. 383 (2003), brings here for review the decision of the Court of Appeals that is explicated in its first *Tennard* opinion, speaking for a majority of the panel, reported at 284 F.3d 591.

that it could have been given mitigating effect under the two pre-*Penry I* special issues submitted to his jury. On both grounds, the court held, there was no *Penry I* violation. 284 F.3d at 595-97. The way the panel reached this result reflects how far the Fifth Circuit's doctrines elaborating on *Penry I* have strayed from this Court's *Penry I* decision.

The panel explained that "[i]n reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury." *Id.* at 595. "To be constitutionally relevant, 'the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition.'" *Id.* (ellipsis in text). The panel then said that Mr. Tennard's evidence of impaired intellectual functioning failed to meet both prongs of the Fifth Circuit test for constitutional relevance.

The evidence failed to meet the "uniquely severe permanent handicap" prong because: "Th[e] Court [of Appeals for the Fifth Circuit] has explained that evidence of a low IQ does not constitute a uniquely severe condition or is within the jury's effective reach pursuant to the teachings of *Penry*." *Id.* at 596, citing *Andrews v. Collins*, 21 F.3d 612, 629-30 (5th Cir. 1994), and *Lackey v. Scott*, 28 F.3d 486, 489-90 (5th Cir. 1994). We will shortly return to the "uniquely severe condition" portion of this holding. Prefatorily, it bears note that the two cited cases entirely fail to explain how Mr. Tennard's evidence of impaired intellectual functioning, as it was presented and argued to the jury at his penalty trial, was "within the jury's effective reach pursuant to the teachings of *Penry*." And other than citing the two cases, the panel below made no effort to explain how the special issues permitted mitigating effect to be given to Tennard's evidence.

The evidence in *Andrews* indicated that Andrews "*may* have had a lower-than-average IQ." 21 F.3d at 630. "Because [the evidence] does not demonstrate that Andrews was mentally retarded," the Fifth Circuit declared, "it does not constitute mitigating evidence outside the scope of the special issues." *Id.* The *Andrews* court did not explain how the mitigating qualities of a low IQ could be given effect within the special issues. It simply asserted – without analysis, and with conspicuous ambiguity – that no vehicle was necessary to give mitigating effect to the evidence. *Id.*

The evidence in *Lackey* showed that Lackey had a below-normal IQ. 28 F.3d at 489. In rejecting Lackey's claim that his low IQ could not be given effect within the special issues, the court first appeared to suggest (as had the *Andrews* court, in an alternative holding) that such evidence was not constitutionally relevant because Lackey failed to establish a nexus between his low intelligence and his crime. The court then said that, even if Lackey's evidence was relevant, it could have been given effect through the dangerousness special issue because his attorney had argued that "Lackey's low intelligence . . . show[ed] that he would not be a future danger to society." *Id.* at 490. On this basis, the court "conclude[d] that the jury could have reasonably considered this evidence in answering the second issue." *Id.*

By contrast, Tennard's defense lawyer did not argue that his evidence of impaired intellectual functioning was relevant to either special issue. Tennard's *prosecutor* noted that this evidence could explain why Tennard *was* dangerous and thus implied, without expressly saying so, that the evidence *supported* a finding of future dangerousness. As to whether Tennard's defense lawyer *could* have argued, like Lackey's, that the evidence showed probable non-dangerousness – thereby inviting an even more direct allusion by Tennard's prosecutor to the tendency of such

evidence to prove dangerousness rather than non-dangerousness – it is altogether plain that a defense argument of this sort would have been both illogical and suicidal. There is no logical way in which low intelligence like Tennard's (as distinguished from impairment so severe that it is *physically* incapacitating) could possibly tend to make an individual *less* dangerous. Low intelligence manifests itself in impaired judgment, and impaired judgment can lead to involvement in crimes that can be violent. If Lackey's lawyer was moved to affront every canon of reason and experience by arguing contrarily that Lackey's low IQ reduced the probability of his future dangerousness, such a desperate dodge can only be understood as an artifact of the pre-*Penry I* special issue regime itself. That regime forced lawyers with double-edged mitigating evidence to resort to ridiculous expedients in an effort to persuade jurors to return "no" answers to special issues on the basis of evidence that could rationally support only a "yes" answer. That lawyers were compelled to make such arguments does not mean that the arguments were reasonable,[12] still less that Mr. Tennard, whose lawyer forbore to make such an argument, should have his *Penry I* claim rejected on no more satisfactory analysis than that Mr. Lackey's lawyer made such implausible argument without success.

The panel also held that Tennard's evidence of impaired intellectual functioning did not meet the second prong of the Fifth Circuit test for constitutional relevance. Even if that impairment constituted a "uniquely severe permanent handicap," the panel ruled that Mr. Tennard's

[12] *See Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), recognizing that an exhortation to the jury to consider mitigating evidence through a logically inadequate vehicle does not transform the vehicle into a logically or constitutionally adequate one.

Penry I claim would fail because he had "made no showing at trial that the criminal act was attributable to this severe permanent condition." *Tennard*, 284 F.3d at 596. "A petitioner must show there is a nexus between the severe permanent condition (here, alleged mental retardation) and the capital murder," *id.* at 597, because "we have expressly rejected the notion that 'a nexus is inherent between any evidence of mental retardation and a crime.'" *Id.* (quoting *Davis v. Scott*, 51 F.3d 457, 461 (5th Cir. 1995)). Accordingly, "Tennard is precluded from establishing a *Penry* claim because he failed to introduce at trial any evidence indicating that the capital murder was in any way attributable to his IQ of 67." 284 F.3d at 597.

III. THE FIFTH CIRCUIT'S "UNIQUELY SEVERE CONDITION" RULE CANNOT JUSTIFY DENYING MR. TENNARD RELIEF.

A. Evidence of Mr. Tennard's impaired intellectual functioning must be considered in mitigation of a possible death sentence.

Mr. Tennard's impaired intellectual functioning as reflected in his IQ and in his behavior during criminal conduct constitutes constitutionally relevant mitigating evidence. The significance of such evidence is recognized both in this Court's repeated decisions and in the consensus of state and federal death penalty statutes.

As the Court observed in *Penry I*, "punishment should be directly related to the personal culpability of the criminal defendant." 492 U.S. at 319. *See also California v. Brown*, 479 U.S. 538, 544 (1987) (O'Connor, J., concurring) ("This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence."). Penry's mental retardation was constitutionally relevant in mitigation because he was "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry I*, 492 U.S. at 322. Low

intelligence, whether or not clinically diagnosed as mental retardation, impairs a defendant's ability to assess the consequences of his behavior and to make reasoned, responsible decisions. *See generally* Alexander J. Tymchuk, L. Charlie Lakin & Ruth Luckasson (eds.), *The Forgotten Generation: The Status and Challenges of Adults with Mild Cognitive Limitations* (2001); "Mainstream Science on Intelligence," *Wall Street Journal*, December 13, 1994, A18. It indisputably reduces personal moral culpability.

In a long line of cases stretching back to *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court has invalidated death sentences when defendants were precluded from introducing, or sentencers were precluded from giving mitigating effect to, evidence of impaired ability to control or to comprehend the consequences of criminal behavior. *See, e.g., Bell v. Ohio*, 438 U.S. 637, 640-41 (1978) (exclusive roster of mitigating factors precluded consideration of, *inter alia*, defendant's "'low average or dull normal intellectual capability'" as well as defendant's emotional instability resulting from drug use); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencing judge refused to consider youthful defendant's turbulent family history and emotional disturbance); *McKoy v. North Carolina*, 494 U.S. 433 (1990) (jury unanimity requirement precluded adequate consideration of defendant's mental and emotional disturbance); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (failure to permit consideration of non-statutory mitigating factors precluded adequate consideration of, *inter alia*, the present effects of defendant's past drug use (inhaling gasoline) and difficult family background).

This Court's reiterated requirement that capital sentencers must be allowed to consider evidence of impaired mental capacity in mitigation is seconded by consistent legislative judgments and pervasive contemporary practice. Virtually every death-penalty jurisdiction that enumerates mitigating circumstances includes a

factor focused on the defendant's impaired capacity to appreciate the wrongfulness of his or her conduct,[13] and all other States would allow for consideration of such evidence via a catch-all provision.[14] Indeed, the current Texas statute that replaced the old special-issue scheme requires direct consideration of the "circumstances of the offense, the defendant's character and background, and the personal moral culpability" of the offender to determine whether the mitigating circumstances are sufficient to warrant a life sentence. Tex. Crim. Proc. Code Ann. Art. 37.071 Sec. 2(e)(1).

---

[13] *See, e.g.*, 21 U.S.C.A. § 848 (1970); 18 U.S.C.A. § 3592 (1994); Ala. Code § 13A-5-51 (1975); Ariz. Rev. Stat. § 13-703 (1977); Ark. Code Ann. § 5-4-605 (1975); Cal. Penal Code § 190.3 (1999); Colo. Rev. Stat. Ann. § 18-1.3-1201 (2002); Conn. Gen. Stat. Ann. § 53a-46a (2001); Fla. Stat. Ann. § 921.141 (1972); Kan. Stat. Ann. § 21-4626 (2002); Ky. Rev. Stat. Ann. § 532.025 (1988); Md. Code Ann., Crim. Law § 2-303 (2002); Miss. Code Ann. § 99-19-101 (2003); Mo. Ann. Stat. § 565.032 (2003); Mont. Code Ann. § 46-18-304 (1977); Neb. Rev. Stat. § 29-2523 (2003); N.H. Rev. Stat. Ann. § 630:5 (2003); N.J. Stat. Ann. § 2C:11-3 (1995); N.M. Stat. Ann. § 31-20A-6 (1978); N.Y. Crim. Proc. Law § 400.27 (1995); N.C. Gen. Stat. § 15A-2000 (1994); Ohio Rev. Code Ann. § 2929.04 (1972); 42 Pa. Cons. Stat. § 9711 (1974); S.C. Code Ann. § 16-3-20 (1976); Tenn. Code Ann. § 39-13-204 (1995); Utah Code Ann. § 76-3-207 (1953); Va. Code Ann. § 19.2-264.4 (1998); Wash. Rev. Code Ann. § 10.95.070 (2002); Wyo. Stat. Ann. § 6-2-102 (1977).

[14] *See, e.g.*, Nev. Rev. Stat. Ann. 200.035.7 (D); Ga. Code Ann. § 17-10-30 (1973); Del. Code Ann. Tit. 11, § 4209 (1975).

B. The Fifth Circuit's "uniquely severe condition" rule is inconsistent with this Court's individualization decisions dating back to *Woodson*, finds no support in *Penry* itself, and cannot be reconciled with the Court's post-*Penry* cases.

1. The Nature of the Fifth Circuit "uniquely severe condition" rule

The Fifth Circuit rejected Mr. Tennard's *Penry I* claim in part on the basis of its longstanding view that mitigating evidence short of a "uniquely severe condition" does not justify relief under *Penry I*. 284 F.3d at 596 ("This Court has explained that evidence of a low IQ does not constitute a uniquely severe condition. . . . "). In this view, evidence of an impairment that does not reach the "uniquely severe condition" threshold is not constitutionally relevant mitigating evidence. *Id.* at 595. *See also Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002), *cert. granted in part by Smith v. Dretke*, 124 S.Ct. 46 (2003). The Fifth Circuit's treatment of impaired intellectual functioning evidenced by low IQ as insufficiently severe to be mitigating has extended to virtually all conditions that curtail a person's ability to make judgments and to appreciate the consequences of behavior. The Circuit has held, for example, that a defendant's evidence of a personality disorder and organic brain damage did not require a supplemental instruction under *Penry I* because the defendant's disabilities were not as severe as those at issue in *Penry I*. *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994). The Fifth Circuit has likewise deemed other sorts of evidence constitutionally irrelevant in mitigation – notwithstanding their classically mitigating character – because such evidence failed to cross the "severity" threshold. *See, e.g., Lackey v. Scott*, 28 F.3d at 489 (evidence of alcoholism); *Davis v. Scott*, 51 F.3d 457 (5th Cir. 1995)

(evidence of parental neglect that was not sufficiently "traumatic").

This view that evidence cannot be genuinely mitigating unless it establishes a uniquely severe condition is also reflected in the Circuit's decisions concerning the Sixth Amendment right to effective representation. In several cases, the Fifth Circuit has found no ineffective assistance of counsel where defense lawyers failed to discover or introduce evidence of very low intelligence that did not constitute severe mental retardation. For example, in *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992), the court described as "weak" a defendant's mitigating evidence of "moderate" mental retardation based on his IQ of 56. *Id.* at 966. According to the court, there was no reasonable probability that a juror would have been persuaded to spare the defendant's life based on such "minimal mitigating evidence." *Id.* Similarly, in *Andrews v. Collins*, 21 F.3d at 624, the court found no ineffective assistance in defense counsel's failure to introduce evidence of the defendant's borderline mental retardation.

2. The "uniquely severe condition" rule cannot be squared with this Court's leading decisions defining the individualization requirement.

This Court has time and again described the Eighth Amendment requirement of individualization in capital sentencing as encompassing any mitigating factor that could persuade the sentencer to return a sentence less than death. In *Lockett v. Ohio*, for example, the lead opinion said that jurors may "not be precluded from considering . . . *any* aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (emphasis added). The Court has repeated this language

in numerous opinions. *See, e.g., Wiggins v. Smith*, 123 S.Ct. at 2543; *Penry v. Lynaugh*, 492 U.S. at 317; *Eddings v. Oklahoma*, 455 U.S. at 112; *Bell v. Ohio*, 438 U.S. at 642. In none of the many pre-*Penry I* cases recognizing and applying the individualization requirement did this Court assert or in any way intimate that evidence is not "constitutionally relevant" unless it meets some "severity" threshold.

Instead, the Court has consistently found violations of the individualization requirement in cases where Fifth Circuit's "uniquely severe condition" test would have precluded such a finding. In *Bell v. Ohio*, 438 U.S. at 640-42, for example, the Court granted relief because of the failure of the Ohio statute to permit adequate consideration of Bell's mental deficiency reflected in part in his "low average or dull normal intellectual capability." *Id.* at 640. In *Mills v. Maryland*, 486 U.S. 367, 370 (1988), the Court held that the state's jury instructions precluded adequate consideration of, among other things, the defendant's mental infirmity reflected in his "minimal brain damage." *Id.* at 370 n.1. And in *Hitchcock v. Dugger*, 481 U.S. at 397, the Court found constitutional error based upon a failure to permit consideration of past substance abuse, including the inhalation of gasoline fumes.[15] Under the Fifth Circuit's

[15] The inappropriateness of the Fifth Circuit's "uniquely severe condition" rule is especially apparent when it is read in conjunction with the Fifth Circuit's additional "no fault" rule, requiring that the "uniquely severe permanent handicap with which the defendant was burdened [resulted] through no fault of his own." *Tennard*, 284 F.3d at 595; *Smith*, 311 F.3d at 680. *See also Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir. 1992) (rejecting evidence of substance abuse because it was self-inflicted). The manifest inconsistency of the "no fault" rule with this Court's *Hitchcock* decision recognizing voluntary drug use as mitigating simply confirms that the Fifth Circuit's test for constitutional relevance, of which the "uniquely severe condition" rule is a part,

(Continued on following page)

"uniquely severe condition" rule, these cases should not have required consideration of the sorts of evidence they did, because the evidence did not show conditions sufficiently severe to be deemed constitutionally mitigating. *See, e.g., Smith*, 311 F.3d at 682 (defendant's "low IQ" and "borderline mental abilities" are inadequate to establish "'uniquely severe permanent handicap'" (quoting *Davis*, 51 F.3d at 460); *Lackey v. Scott*, 28 F.3d at 489 (rejecting evidence of alcoholism as insufficiently "severe").

3. *Penry I* cannot be read to establish a "uniquely severe condition" rule.

In several of its decisions elaborating the "uniquely severe condition" rule, the Fifth Circuit contrasts the purportedly "unique" aspects of Penry's evidence with the evidence offered by the condemned inmates in those cases. *See, e.g., Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (*en banc*); *Robertson v. Cockrell*, 325 F.3d 243, 251-52 (5th Cir. 2003) (*en banc*). Indeed, in the companion case now before the Court, *Smith v. Dretke*, No. 02-11309, the Fifth Circuit describes Penry's evidence in detail, enumerating his specific IQ range, his organic brain damage, his poor performance in school, and his abuse as a child. *Smith v. Cockrell*, 311 F.3d at 681. The court also highlights the opinion of a defense psychiatrist in *Penry I* who testified during the guilt-innocence phase that Penry's mental deficits "'made it impossible for him to appreciate the wrongfulness of his conduct.'" *Id.* (quoting *Penry I*, 492 U.S. at 307-09). These descriptions of Penry's evidence are aimed at establishing a firm "severity" requirement that can serve to foreclose claims based on less dramatic

---

is fundamentally out of keeping with this Court's individualization caselaw.

evidence. *See id.* at 680: "On the issue of whether the defendant has a 'uniquely severe permanent handicap', this court has limited *Penry I* to the facts of that case."

Nothing in the text or the analytic approach of the *Penry I* decision supports this kind of reading. The *Penry I* Court did not describe Penry's evidence as "unique" or "severe" or as revealing an extreme degree of disability. Rather, in accord with *Lockett* and *Eddings*, the Court concluded simply that Penry had presented evidence of reduced culpability which could not be given sufficient consideration via the old Texas special-issue scheme. 492 U.S. at 322 ("Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment.").

Moreover, the structure of the opinion confirms that the *extent* of Penry's impairment was not essential or even related to the ultimate result. The Court describes Penry's evidence in Part I of the opinion, which takes the form of a thorough but non-evaluative recital of the facts and posture of the case. In Parts II and III of the opinion, in which the Court considers Penry's constitutional claim of inadequacy of the special-issue procedure, the Court never again mentions any specific details of Penry's mitigating evidence. Instead, the Court emphasizes *Lockett*'s ruling that a sentencer may "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" 492 U.S. at 317 (quoting *Lockett*, 438 U.S. at 604).

In deciding the companion case below, the Fifth Circuit stressed a distinction between the mitigating evidence in that case and testimony given at the guilt-innocence phase

of *Penry I* dealing with Penry's inability "'to appreciate the wrongfulness of his conduct.'" *See Smith*, 311 F.3d at 681 (quoting 492 U.S. at 307-09); *and see* 311 F.3d at 682 ("Smith's expert, Dr. Fason, did not testify that Smith was mentally retarded, let alone that his mental retardation made him unable to appreciate what he had done. . . ."). This treatment of the evidence conflates the concepts of mitigation and exculpation. Of course, certain types of intellectually debilitating conditions, if proven to a particular degree, will preclude any criminal liability for a defendant's conduct. *See, e.g.*, Tex. Pen. Code § 8.01(a) (2002) ("It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong."). At Penry's trial, if the jury had been persuaded that his mental deficits wholly precluded his ability "to appreciate the wrongfulness of his conduct," Texas law would have required a not guilty verdict, and the punishment phase would never have been reached. But the jury, by finding Penry guilty of capital murder, clearly *rejected* Penry's guilt-innocence phase claim that he could not appreciate the wrongfulness of his conduct. This Court's decision in *Penry* thus does not require that a defendant offer testimony, as in Penry's trial, of a completely debilitating condition. It confirms the opposite: even when a jury does *not* credit the presence of a uniquely severe condition, evidence *short* of such a disability must be afforded a vehicle to be considered as *mitigating* though not *exculpating*.

Indeed, the Court has always understood mitigation as something less than exculpation. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), for example, the trial judge had taken the position that he was precluded by law from considering evidence of the defendant's troubled childhood and emotional disturbance in mitigation. The Oklahoma Court of Criminal Appeals affirmed Eddings' death sentence on the ground that this evidence did not support a

finding of any legal excuse from criminal liability. This Court then reversed because "such evidence was undoubtedly relevant to mitigation even if it did not *excuse* the defendant's conduct." *McKoy v. North Carolina*, 494 U.S. at 441 (explaining the Court's rationale in *Eddings*).[16]

4. This Court's decisions following *Penry I* leave no room for the Fifth Circuit's "uniquely severe condition" rule.

The Court's cases since *Penry I* confirm that the Fifth Circuit's "uniquely severe condition" rule is altogether untenable. Just one Term after *Penry I*, the Court invalidated a North Carolina requirement of jury unanimity as a precondition for jurors' consideration of mitigating evidence. *McKoy v. North Carolina*, 494 U.S. 433 (1990). In *McKoy*, the State had sought to defend this unanimity requirement on the ground that it was a permissible rule of "relevance." North Carolina's argument – analogous to the Fifth Circuit's justification for the severity rule – was that extenuating evidence had to possess a minimum degree of strength before it could be considered "relevant" in mitigation; the unanimity requirement was defended as

---

[16] In this respect, the Court has followed the logic of the Model Penal Code's death penalty provision, drafted by the American Law Institute a decade before *Furman v. Georgia*, 408 U.S. 238 (1972). Model Penal Code § 210.6(4)(b)-(h) (Proposed Official Draft 1962). The enumerated mitigating factors in the proposed code focus overwhelmingly on imperfect exculpation, consistent with the Model Penal Code's more general attempt to link punishment to culpability. The Model Penal Code commentary explains that the Code's choice of mitigating factors reflects the "widespread acceptance" of the idea that "diminished" or "partial" responsibility should reduce first-degree to second-degree murder. *Id.*, § 210.6 cmt., at 138-40 (1980); *see* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 Yale L.J. 835, 856-57 (1992) (discussing the Model Penal Code's focus on reduced culpability).

a mechanism serving to guarantee the requisite degree of strength. *See* 494 U.S. at 440. This Court resoundingly rejected any such notion of constitutional "relevance":

> [T]he State Supreme Court's holding that mitigating evidence is 'relevant' only if the jury unanimously finds that it proves the existence of a mitigating circumstance distorts the concept of relevance. "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"

Id. (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (quoting Fed. R. Evid. 401)). Thus, the degree of strength of evidence proffered by a capital defendant in mitigation is a matter for the sentencer to decide, not a ground for withholding the evidence from the sentencer by declaring it irrelevant: "the mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." 494 U.S. at 441.

The Court's recent decision in [*Terry*] *Williams v. Taylor*, 529 U.S. 362 (2000), also implicitly rejects the Fifth Circuit's "uniquely severe condition" rule. *Williams* grants Sixth Amendment ineffective-assistance-of-counsel relief to a Virginia defendant whose lawyer failed to develop mitigating evidence – primarily evidence of the defendant's abused background and borderline mental retardation – at the penalty phase of his capital trial. The Virginia Supreme Court had rejected Williams' claim in large part because it did not find prejudice resulting from counsel's failure. 529 U.S. at 396. This Court, however, faulted the Virginia Supreme Court's refusal to recognize that evidence of "abuse and privation, *or* the reality that

[the defendant] was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398 (emphasis added).[17] Plainly, the Court in *Williams* concluded that Williams' undeveloped evidence of borderline mental retardation was mitigating; equally plainly, the Court in *Williams* saw no need to inquire whether borderline mental retardation is a "uniquely severe condition" in order to reach this conclusion.[18]

IV. THE FIFTH CIRCUIT'S "NEXUS" RULE CANNOT JUSTIFY WITHHOLDING RELIEF FROM MR. TENNARD.

A. The Fifth Circuit's "nexus" rule.

The Fifth Circuit created its "nexus" rule in the wake of the decision in *Penry I*, as it addressed claims by death-sentenced inmates that the former Texas capital sentencing statute had denied them an adequate vehicle for the jury's consideration of their mitigating evidence. In its original form, the rule was perhaps less onerous than it

---

[17] This aspect of *Williams* plainly overrules the Fifth Circuit's cases discussed at page 28 *supra*, holding that "moderate" mental retardation is "weak" for purposes of discerning prejudice in the Sixth Amendment context.

[18] More recently, in *Wiggins v. Smith*, 123 S.Ct. at 2543, the Court found Wiggins' trial counsel ineffective for failing to investigate and introduce evidence of Wiggins' abused background, and held that Wiggins was prejudiced by counsel's deficient performance. *Wiggins* demonstrates the error of still another canon in the Fifth Circuit's radically misconceived post-*Penry I* jurisprudence – the Fifth Circuit axiom that childhood abuse standing alone does not constitute constitutionally relevant mitigating evidence. *See Robertson v. Cockrell*, 325 F.3d at 251 ("*Penry I* required such a vehicle only with regard to evidence of diminished culpability arising from a *combination* of extreme childhood abuse *and* mental retardation." (emphasis added)).

quickly became. In *Graham v. Collins*, for example, the court stated that evidence of a defendant's disability could "reduce culpability where it is *inferred* that the crime is attributable to the disability." 950 F.2d at 1033 (emphasis added).[19] By 1994, however, the Fifth Circuit's application of its "nexus" rule had grown increasingly rigid. In *Madden v. Collins*, the court refused to require additional instructions to permit the jury to give mitigating consideration to Madden's evidence of personality disorder and organic brain damage because those mental disorders were "not linked *causally* to the criminal act," and because he presented "insubstantial evidence that his childhood abuse . . . had such a psychological effect on him *that it led to the criminal act*." 18 F.3d at 308 (emphases added).

As the Fifth Circuit's cases following *Madden* have made clear, the "nexus" rule reflects a general theory of mitigating relevance that requires the defendant to prove a causal connection between any proffered mitigating circumstance or condition and the offense before the sentencer is required to consider that circumstance or condition in mitigation of punishment. *See, e.g.*, *Nelson v. Cockrell*, 77 Fed. Appx. 209, 213 (5th Cir. 2003) (unpublished) (rejecting a contention based on *Penry I* because "no evidence suggested that [if] there was brain damage, Nelson's [criminal] acts were *caused* by it") (emphasis added); *Robertson*, 325 F.3d at 253 (rejecting a *Penry I* claim based on evidence of child abuse because the abuse suffered by the defendant "was shown neither to be severe

[19] *See also, e.g.*, *Russell v. Collins*, 998 F.2d at 1292 (there is no need to prove "a precise nexus between [the defendant's] background evidence and the crime," so long as a "rational jury [could] *infer*" at least a partial connection between them) (emphasis added); *Motley I*, 3 F.3d at 791 ("if a jury could reasonably *infer*" that the crime is "*in some way* attributable" to the defendant's condition, "no more specific nexus is required") (emphases added).

nor to have any *causal* nexus with his crimes") (emphasis added).

The rigidity with which this rule has been enforced is reflected in the fact that the Fifth Circuit has virtually never found a defendant to have established a sufficient causal "nexus" between his or her mitigating condition and the crime to warrant additional instructions going beyond the old special-issue questions. In only one reported case, *Blue v. Cockrell*, 298 F.3d 318 (5th Cir. 2002), has the Fifth Circuit found its nexus requirement satisfied. *Blue*, 298 F.3d at 321 (sufficient nexus to uphold *Penry II* claim where expert testified that defendant's mental retardation, paranoid schizophrenia, and antisocial personality disorder made it "almost inevitable that he would be in conflict with the law"). In one early case involving child abuse, the court originally found a nexus but subsequently reversed itself because the consequences of that abuse were not "permanent" and thus required no additional instruction. *Motley v. Collins*, 3 F.3d 781, 791 (5th Cir. 1993), *opinion withdrawn and superseded*, 18 F.3d 1223, 1234-35 (5th Cir. 1994). In all other reported cases, the court has found no nexus between the defendant's claimed mitigating circumstances and his crime.

B. The Fifth Circuit's "nexus" rule represents an unjustified departure from this Court's individualization and proportionality decisions.

The Fifth Circuit has erected its entire "nexus" edifice on the foundation of a single word in a single sentence in Justice O'Connor's *Penry I* opinion. Justice O'Connor wrote there that evidence about a defendant's background and character are viewed as mitigating because "'defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have

no such excuse.'" *Penry I*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (emphasis added). *See, e.g.*, *Robertson*, 325 F.3d at 252 (citing *Penry I's* "attribution" language). As we will show below, neither a proper reading of Justice O'Connor's "attribution" phrase nor the conception of mitigation in which it is grounded supports the Fifth Circuit's view of "nexus" as a black-letter condition precedent to consideration of a capital defendant's mitigating evidence.

To begin with, the Fifth Circuit's exegesis of Justice O'Connor's "attribution" language fails to take account of its setting, which provides essential context for understanding what it means. When describing the role of mitigating evidence in reducing a defendant's moral culpability, Justice O'Connor begins by stating that she is articulating a "belief long held by this society." *Penry I*, 492 U.S. at 319; *Brown*, 479 U.S. at 545 (O'Connor, J., concurring). She is thus drawing on traditional attitudes reflected in longstanding practices within our criminal justice system. As the Court recognized in *Woodson v. North Carolina*, 428 U.S. at 294-98, almost from this country's founding in the late 18th Century and continuing into the 20th Century, American jurisdictions progressively moved toward a system of capital sentencing in which jurors were permitted to consider and assess the significance of mitigating evidence bearing on the offender and the offense. The adoption of this approach reflected in large part a shared and evolving view that a defendant's circumstances – the obstacles, vicissitudes and deficits that he or she endured – are relevant to the just assessment of punishment.

The Fifth Circuit's rigid "nexus" rule, on the other hand, derives no support, much less longstanding support, from the history or traditions of the States in administering their criminal justice systems generally or the death

penalty in particular. Such a rule, which decrees arbitrarily that no circumstance in a human life can be deemed to warrant the mitigation of punishment unless it bears a specific, identifiable cause-and-effect relationship to the criminal act being punished, has no historical or contemporary credentials in either theory or practice. None of the post-*Furman* federal or state capital sentencing statutes contains a "nexus" rule or any similar restriction of the reasoning through which jurors are permitted to arrive at a "'reasoned moral response' to . . . evidence [proffered in mitigation] in determining whether death [is] the appropriate punishment." *Penry I*, 492 U.S. at 322. Nor have state or federal courts (outside of the *Penry* litigation) imposed or even discussed such a restriction. In its many decisions establishing and elaborating the Eighth Amendment's individualization requirement, this Court likewise has never hinted that trial or appellate judges – as opposed to jurors – are to determine as a threshold matter whether a sufficient connection exists between a defendant's mitigating evidence and his or her crime to justify a sentence less than death.[20]

Thus, the Fifth Circuit appears to have mistaken Justice O'Connor's explanatory *description* of the reason why jurors tend to find certain experiences and characteristics mitigating for a doctrinal *prescription* – a mandatory rule of constitutional law that places on each and every capital defendant the heavy burden of documenting that his or her crime was deterministically "caused" by any circumstances s/he asserts in mitigation. That distorts Justice O'Connor's point entirely. For the "belief long held by this society" to which she referred is that persons who come from a "disadvantaged background [or suffer from] emotional and mental problems" are *as a matter of common*

[20] See the opinions cited in notes 22-24 *infra*.

experience and understanding less likely than others to be able to control their impulses or fully appreciate the consequences of their criminal conduct. The link between such circumstances and a susceptibility to involvement in crime is not something the defendant is obliged to prove by "causal" mechanics, but is rather a connection that already resides in our common stock of knowledge about how people's experiences and frailties can shape or misshape their lives. Jurors are expected and trusted to bring this knowledge to bear in assessing the mitigating force of a defendant's background; and the teaching of *Penry I* is precisely that they may not constitutionally be precluded from doing so.

Justice O'Connor's "attribution" observation in *Penry I* is, of course, a quotation from her concurring opinion in *California v. Brown*. The question before the Court in *Brown* was whether an instruction cautioning the jury not to be swayed by, *inter alia*, "mere sympathy" in determining sentence had the effect of limiting their consideration of the defendant's mitigating evidence. *Brown*, 479 U.S. at 541-42. Justice O'Connor found that it did not, and the phrase in which she crystallized her view of a capital sentencing jury's role illuminates the "attribution" phrase upon which the Fifth Circuit has placed such great weight. As Justice O'Connor put it, "*Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed . . . should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion." 479 U.S. at 545. This analysis, read as a whole, reveals Justice O'Connor's first premise to be that what makes a "reasoned moral response" *reasoned*, not based solely on emotion, is that it results from assessing the facts of each particular case in light of the longstanding Anglo-American societal consensus that defendants who come from "a disadvantaged background" or are burdened by

"emotional and mental problems" can fairly be regarded as less culpable for their criminal conduct.

Moreover, the Fifth Circuit's reading of Justice O'Connor's "attribution" phrase in *Penry I* flies in the teeth of explicit statements about the nature of constitutionally protected mitigating evidence in other opinions that Justice O'Connor has joined or authored. For example, in *Payne v. Tennessee*, 501 U.S. 808 (1991), she joined Chief Justice Rehnquist's opinion for the Court, which observed that Payne had presented evidence that included "a low IQ," and that this and other evidence was constitutionally mitigating despite the fact that "[n]one of this testimony was related to the circumstances of [the] crimes." 501 U.S. at 826. Similarly, in *South Carolina v. Gathers*, 490 U.S. 805 (1989), Justice O'Connor pointed out that "[n]one of [the defendant's mitigating] evidence was directly relevant to the events of [the crime], but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness." 490 U.S. at 817-818 (O'Connor, J., dissenting on other grounds). These expressions cannot be reconciled with the Fifth Circuit's extrapolation of a "nexus" rule from Justice O'Connor's "attribution" phraseology in *Penry I*.

In addition to attempting to tie its "nexus" prescription to Justice O'Connor's *Penry I* opinion, the Fifth Circuit has attempted to package that prescription, together with the accompanying prescription that mitigation must consist of a "uniquely severe condition," as a rule of "constitutional relevance." *See, e.g., Tennard*, 284 F.3d at 595 ("[t]o be constitutionally relevant," mitigating evidence must show a nexus with the criminal act). As we noted in our discussion of the "uniquely severe condition" construct in Part III *supra*, this conception of "constitutional relevance" cannot be sustained in light of *McKoy v. North Carolina*. In *McKoy*, the Court rejected North Carolina's effort to preclude jurors from considering

evidence offered in mitigation that its state supreme court had declared "legally irrelevant" because it was insufficiently strong to convince all members of the jury unanimously that certain facts were true and deserved to be viewed as mitigating. 494 U.S. at 438. Noting that the state court's rationale "distorts the concept of relevance," *id.* at 440, this Court explained that "mitigating circumstances not unanimously found to be present by the jury did not become 'irrelevant' to mitigation merely because one or more jurors did not believe that the circumstance had been proved as a factual matter *or did not think that the circumstance, though proved, mitigated the offense.*" 494 U.S. at 440-441 (emphasis added; footnote omitted). *McKoy* refused to permit the North Carolina Supreme Court to substitute a legal rule of acceptable mitigation for the sentencer's judgment as to what should be deemed mitigating in the case of each individual defendant, saying that the Court's earlier holdings in *Skipper v. South Carolina*, 476 U.S. 1 (1986) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), "show that the mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence *if the sentencer could reasonably find that it warrants a sentence less than death.*" *McKoy*, 494 U.S. at 441 (emphasis added).

As we also noted in Part III, it is not just the *Eddings-Skipper-McKoy* line of cases that refutes the Fifth Circuit's misreadings of *Penry I*. Last Term in *Wiggins v. Smith*, this Court reversed Wiggins' death sentence because his lawyer failed to investigate and present to his sentencing jury evidence of, *inter alia*, Wiggins' "privation and abuse" prior to age six and "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." 123 S.Ct. at 2542. In finding that "th[is] kind of troubled history [is] relevant to assessing a defendant's moral culpability," *id.*, the Court in *Wiggins* cites *Penry I*, *Eddings*, and *Lockett*. Notably, it nowhere suggests that Wiggins' traumatic childhood and adolescence experiences

were "relevant" solely to the extent that they constituted a "but-for" cause of his offense.

Similarly, in [*Terry*] *Williams v. Taylor*, the Court found trial counsel ineffective for failing to present mitigating evidence about Williams' troubled background but did not suggest that the unpresented mitigating evidence met – or had to meet – any test of relevance involving a causal connection to Williams' crime. To the contrary, the Court held that counsel's failure to present this background evidence required a new penalty trial for Williams even though the evidence manifestly provided no simplistic, "causal" explanation for Williams' having committed the crime. In the Court's view, a penalty retrial was required because the evidence which Williams' lawyer had not presented, including specifically evidence of Williams' "childhood [of] abuse and privation," "might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398. Justice O'Connor – who, according to the Fifth Circuit, laid the cornerstone for its "nexus" rule in her *Penry I* opinion – agreed that resentencing was required in *Williams*. 529 U.S. at 413. She, too, never hinted that Williams' deprived and abused upbringing or his borderline mental retardation became relevant only if such circumstances strictly "caused" him to commit the crime. Instead, she stated without qualification that such evidence was vital for the jury to consider, *id.* at 414-16, and she joined the portion of Justice Stevens' opinion emphasizing its relationship to the jury's assessment of his "moral culpability." *See also Robertson*, 325 F.3d at 273 (Stewart, J., dissenting) (pointing out that *Williams*' characterization of all this evidence as mitigating did not

depend on its having any causal connection to the offense).[21]

As these cases illustrate, the Fifth Circuit's "nexus" rule finds no support in the Court's opinions that describe what counts as constitutionally relevant mitigating evidence,[22] interpret the concept of "relevance" generally,[23] and depend on jurors to grasp the significance of evidence presented in a capital sentencing proceeding based on their common sense and life experience.[24] Nor can the mechanistic character of the "causal" inquiry required by the "nexus" rule be squared with the Court's repeated recognition that the capital sentencing decision is, in its essence, not about reductionistic factual connections but about irreducible moral judgments.[25] The ultimate question

[21] Three years ago, shortly after *Williams* was announced, the Fifth Circuit acknowledged in a footnote that its "nexus" rule was "not consistent with" *Williams*. *Dowthitt v. Johnson*, 230 F.3d 733, 746 n.15 (5th Cir. 2000). Notwithstanding this acknowledgment, the Fifth Circuit has continued uniformly to enforce the "nexus" rule.

[22] *See, e.g., Lockett v. Ohio*, 438 U.S. at 604 (constitutionally relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the crime that the defendant proffers as a basis for a sentence less than death"); *Eddings v. Oklahoma*, 455 U.S. at 110 (same); *Skipper v. South Carolina*, 476 U.S. at 4 (same).

[23] *See, e.g., McKoy v. North Carolina*, 494 U.S. at 440 (quoting *New Jersey v. T.L.O.*, 469 U.S. at 345 (same, quoting Fed. R. Evid. 401)) ("[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

[24] *See, e.g., Boyde v. California*, 494 U.S. 370, 383-385 (1990) (emphasizing ability of jurors to appreciate the significance of mitigating factors); *Buchanan v. Angelone*, 522 U.S. 269, 272, 278 (1998) (same); *Weeks v. Angelone*, 528 U.S. 225, 234-35 (2000) (same).

[25] *See, e.g., Turner v. Murray*, 476 U.S. 28, 33-34 (1986) (describing the capital sentencing decision as "a highly subjective, unique, individualized

(Continued on following page)

for the capital sentencer is nothing less than whether "death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. That question, as the Court has consistently taught since it outlawed mandatory death sentences in 1976, lies at the very heart of the Eighth Amendment's prohibition of cruel and unusual punishments.

The Fifth Circuit's "nexus" rule disregards all of these teachings. Its inflexible insistence on a showing that any proffered mitigating circumstance was "linked causally to [the defendant's] criminal act" before the jury may consider evidence of that circumstance suggests a fundamental confusion of mitigation with excuse. A defendant whose criminal act is mechanically "attributable" to a uniquely severe permanent condition brought about through no fault of his or her own is traditionally understood to have a complete defense to criminal liability, as when a defendant claims that the crime was the product of a mental disorder that rendered him or her incapable of understanding what s/he was doing or of refraining from doing it.[26] It

judgment regarding the punishment that a particular person deserves") (citation and internal quotation marks omitted); *Penry I*, 492 U.S. at 322-23; *California v. Ramos*, 463 U.S. 992, 1007-1009 (1983).

[26] Much of the mitigating evidence traditionally understood as indispensable to an assessment of the defendant's personal moral culpability takes the form of an imperfect defense, *i.e.*, it functions to reduce, but not eliminate, the degree to which the defendant is morally blameworthy for the crime, and thus influences the sentencer's judgment about what constitutes an appropriate punishment. Many of the mitigating circumstances enumerated in various capital sentencing statutes reflect this perspective. *See, e.g.*, 18 U.S.C. §§ 3592(a)(1) (mitigating circumstance that defendant's ability to appreciate wrongfulness of his conduct or comply with the law was "significantly impaired, regardless of whether [his] capacity was so impaired as to constitute a defense to the charge"); 21 U.S.C. §§ 848(m)(1) (same); Ariz. Rev. Stat. §§ 13-703(1) (same); Colo. Rev. Stat. Ann. §§ 18-1.3-1201(4)(b) (same); Conn. Gen. Stat. Ann. §§ 53a-46a(h)(3) (same); Ky. Rev. Stat. §§ 532.025(7) (same); N.H. Rev. Stat. §§ 630:5(VI)(a) (same); N.J. Stat.

(Continued on following page)

was precisely this sort of confusion about the difference between mitigation and excuse that this Court was required to correct in *Eddings v. Oklahoma*. The state court there had concluded that Eddings was not constitutionally

---

Ann. §§ 2C:11-3(5)(d) (same); Tenn. Code Ann. §§ 39-13-204(j)(8) (same); Ill. Comp. Stat. Ch. 720 §§ 5/9-1(21)(c)(2) (defendant committed murder "under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution"); Ky. Rev. Stat. §§ 532.025(b)(2) (same); N.Y. Crim. Proc. Law §§ 400.27(9)(e) (defendant was "mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution"); Ky. Rev. Stat. §§ 532.025(7) (defendant's capacity was impaired as a result of intoxication even though "insufficient to constitute a defense to the crime"); 18 U.S.C. §§ 3592(a)(2) (defendant was "under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge"); 21 U.S.C. §§ 848(m)(2) (same); Ariz. Rev. Stat. §§ 13-703 (same); Colo. Rev. Stat. Ann. §§ 18-1.3-1201 (same); N.H. Rev. Stat. §§ 630:5(VI)(b) (same); N.Y. Crim. Proc. Law §§ 400.27(9)(c) (same); Ky. Rev. Stat. §§ 532.025(b)(6) (defendant "acted under duress or under the domination of another person even though the duress or domination [is] not sufficient to constitute a defense to the crime"); MD. Code Ann. Crim. Law §§ 2-203(2)(iii) (defendant "acted under substantial duress, domination, or provocation of another, but not so substantial as to constitute a complete defense to the prosecution"); 42 Pa. Cons. Stat. §§ 9711(e)(5) (defendant "acted under extreme duress, although not such duress as to constitute a defense to prosecution . . ."); 18 U.S.C. §§ 3592(a)(3) (defendant's participation in the crime was "relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge"); 21 U.S.C. §§ 848(m)(3) (same); Ariz. Rev. Stat. §§ 13-703(G)(3) (same); Colo. Rev. Stat. Ann. §§ 18-1.3-1201(4)(d) (same); Conn. Gen. Stat. Ann. §§ 53a-46a(h)(4) (same); N.Y. Crim. Proc. Law §§ 400.27(9)(d) (same); Ky. Rev. Stat. §§ 532.025(b)(4) (defendant committed offense "under circumstances that [he] believed to provide a moral justification or extenuation for his conduct even though [such circumstances] are not sufficient to constitute a defense to the crime").

By contrast, the Fifth Circuit's "nexus" requirement in its strictest form demands that the defendant prove facts that would effectively relieve him of *any* criminal liability for the offense, or render him legally *ineligible* for a particular penalty.

entitled to have his mitigating evidence of emotional and psychological problems considered by the sentencer because he apparently "knew the difference between right and wrong" – satisfying "the test of criminal responsibility" – and his turbulent family background did not "excuse" his crime. 455 U.S. at 113. Because the state court had considered as mitigating "only that evidence . . . which would tend to support a legal excuse from criminal liability," the Court held that it had "violated the rule in *Lockett*." *Id.* at 114.[27]

Finally, even if the Fifth Circuit's analysis could withstand Eighth Amendment scrutiny where other types of mitigating evidence are involved, it can no longer be sustained after *Atkins v. Virginia*, 536 U.S. 304 (2002), with respect to Mr. Tennard's evidence of impaired intellectual functioning. *Atkins* recognizes a broad consensus that the very condition of mental retardation is invariably mitigating, so that no defendant with such a condition can be deemed culpable enough to suffer the death penalty. As the Court explained in *Atkins*, "today our society views mentally retarded offenders as *categorically less culpable* than the average criminal," and, while mentally retarded capital defendants' impairments "do not warrant an exemption from criminal sanctions . . . they *do diminish* their personal culpability." 536 U.S. at 316, 318 (emphases added). The Court's language – describing a condition which renders a defendant "categorically less culpable," and which "does" (rather than, *e.g.*, "could" or "might") diminish the defendant's personal culpability – reflects an

---

[27] The Court expressly reiterated this portion of *Eddings*' holding eight years later in *McKoy*. *See McKoy*, 494 U.S. at 441 (rejecting the notion that evidence is "irrelevant to mitigation [where it does] not support a legal excuse from criminal liability"; "such evidence [is] undoubtedly relevant to mitigation even if it d[oes] not *excuse* the defendant's conduct") (citation omitted).

understanding that a defendant's impaired intellectual functioning has an *inherently* mitigating relationship to his offense. At a minimum, that must be the case where the defendant's IQ, like Mr. Tennard's, is so low that it falls within the range consistent with a finding of mental retardation. The Fifth Circuit erred on original submission in applying to Mr. Tennard its pre-*Atkins* decisions demanding strict proof of a "nexus" between low intelligence and his crime.[28] It repeated its error on remand from this Court after *Atkins* when it failed to recognize that those opinions can no longer stand.

V. THE FIFTH CIRCUIT ERRED IN DENYING MR. TENNARD A CERTIFICATE OF APPEALABILITY (COA), AND THIS COURT SHOULD DECIDE THE MERITS OF HIS *PENRY I* CLAIM.

In the preceding sections of this brief we have shown (1) that in denying Mr. Tennard a certificate of appealability the Fifth Circuit invoked its generic "uniquely severe condition" and "nexus" rules for resolving claims of constitutional sentencing error under *Penry I*; and (2) that those rules are fundamentally wrong. It follows *a fortiori* that the decision

[28] *See, e.g., Harris v. Johnson*, 81 F.3d 535, 539 (5th Cir. 1996) (rejecting a *Penry* claim based on "borderline intelligence" due to "lack of nexus between the mitigating evidence and the criminal act," and observing in a footnote that while Harris' counsel "[a]t oral argument . . . vigorously contended that *a nexus is inherent* between any evidence of mental retardation and a crime, thus obviating a need for any additional showing," "*[o]ur precedents require otherwise*") (emphases added; citations omitted); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir. 1999) (same, citing *Harris* and *Davis v. Scott*, 51 F.3d 457, 462 (5th Cir. 1995)); *Lackey v. Scott*, 28 F.3d at 489 (holding that there was no need for an additional instruction on mitigation because the evidence did not suggest that Lackey's crime "was attributable to his low intelligence or childhood abuse").

below cannot be upheld consistently with the standards for issuance of COA's reaffirmed by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Not only could "jurists of reason . . . disagree with the district court's resolution of [Mr. Tennard's] constitutional claims," *id.* at 1034 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), but those who disagreed would be correct on the merits.

Since the Fifth Circuit's rules underlying the decision below are incorrect and must fall when reviewed both in Mr. Tennard's case and in the companion case of *Smith v. Dretke* – where the Court of Appeals reached the merits in form as well as in substance – it is neither necessary nor appropriate to send Mr. Tennard's case back to the Court of Appeals for the second time in two years. *See* 28 U.S.C. § 2106. Mr. Tennard is already overdue for relief from his unconstitutional sentence of death; and now that the Fifth Circuit jurisprudence occluding his *Penry I* claim has been brought before this Court and shown to be ill-founded root and branch, he should receive that relief without further delay.

CONCLUSION

Mr. Tennard's death sentence offends *Penry I* and should be vacated.

Respectfully submitted,

RICHARD H. BURR
BURR & WELCH, P.C.
412 Main Street, Ste. 1100
Houston, Texas 77002
(713) 628-3391
(713) 893-2500 fax
Counsel of Record
for Petitioner

ROBERT C. OWEN
OWEN & ROUNTREE, L.L.P.
P.O. Box 40428
Austin, Texas 78704
(512) 232-9391
(512) 804-2685 fax

JORDAN M. STEIKER
727 E. Dean Keeton
Austin, Texas 78705
(512) 232-1346
(512) 232-2399 fax

Counsel for Petitioner